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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 121203677-2677-01]

RIN 0648- BC67

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Closure of the Elephant Trunk Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; emergency action.

SUMMARY: This temporary rule implements emergency measures under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) to close the Elephant Trunk Area (ETA) to all scallop vessels for up to 180 days in order to protect the abundance of small scallops in the area. Closing the ETA will prevent fishing effort in this area, which could reduce long-term scallop biomass and optimum yield from the ETA, and could compromise the overall success of the scallop area rotational management program. The New England Fishery Management Council (Council), with the support of the scallop industry, requested that NMFS take this action quickly in order to minimize fishing effort in the ETA.

DATES: Effective [insert date of publication in the FEDERAL REGISTER], through June 10, 2013. Comments must be received by [insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: The Environmental Assessment (EA) is available by request from: John K. Bullard, Regional Administrator, National Marine Fisheries Service, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930-2276, or via the Internet at <http://www.nero.noaa.gov>.

You may submit comments on this document, identified by NOAA-NMFS-2012-0237, by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal [www.regulations.gov](http://www.regulations.gov). To submit comments via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter NOAA-NMFS-2012-0237 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on the right of that line.
- Mail: Submit written comments to John K. Bullard, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, “Comments on Emergency Rule to Close the Elephant Trunk Area.”
- Fax: (978) 281-9135; Attn: Travis Ford.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required

fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Travis Ford, Fishery Policy Analyst, 978-281-9233; fax 978-281-9135.

#### SUPPLEMENTARY INFORMATION:

##### Background

In 2004, a large abundance of small scallops was discovered in the ETA, and later that year, the ETA was closed to scallop fishing to protect the small scallops and allow them to grow. Following closure of the ETA, scallop biomass increased steadily in the area. When the ETA opened in 2007, it contained over one-quarter of the total scallop biomass. The area was fished as a controlled access area for 4 years (2007-2010) and supported a total of 12 access area trips for each full-time vessel, yielding around 72 million lb (32,659 mt) of scallops while it was an access area. As designed under the scallop fishery's area rotation program, the heavy fishing effort decreased scallop biomass significantly. Framework Adjustment 22 to the Scallop FMP (Framework 22) (76 FR 43774; July 21, 2011), which used 2010 scallop resource survey results, changed the ETA from an access area to an open area because the scallop biomass no longer supported access area trip allocations to that area.

At the Council's Scallop Plan Development Team (PDT) meeting on August 19 and 20, 2012, staff from the NMFS Northeast Fisheries Science Center and researchers from the Virginia Institute of Marine Science (VIMS), Arnie's Fisheries, and the University of Massachusetts School for Marine Science and Technology (SMAST) presented results from their 2012 ETA scallop resource surveys. All four surveys, which represent the best available scientific information regarding the status of the scallop resource, indicated that the abundance of very

small scallops (which represents future recruitment for the fishery) in the ETA is extremely high compared to recent years. In 2012, the mean number of scallops per tow with less than 75 mm (3 in) shell height in the ETA was 994, compared to 24 in 2011. Most of the scallop biomass in the Mid-Atlantic is in the ETA and the Delmarva Area (currently closed). However, most of this biomass is small scallops.

Vessels are currently allowed to fish open area days-at-sea in the ETA. To allow any additional trips into the area will result in the taking of these abundant small scallops, thereby preventing maximizing optimal catch in the future under the rotational management scheme. Targeting of scallops in the ETA at this time is likely to have negative impacts on recruitment in the short and medium term, and could reduce the long-term biomass and yield from the ETA and the overall Mid-Atlantic area. The success of the entire scallop access area rotational management program depends on timely openings and closing of access areas in order to protect scallop recruitment and optimize yield. This is particularly true in the Mid-Atlantic, where recruitment has been well below average for several years. Further, if vessels choose to fish in the ETA, scallop catch rates will likely be low, which increases fishing effort, bycatch, costs, and impacts on protected resources and habitat.

At its September 2012 meeting, the Council requested that we take emergency action under Section 305 (c) of the Magnuson-Stevens Act to close the ETA as soon as possible to avoid the negative impacts described above. The Council's request was supported by the Fisheries Survival Fund (a group that represents the majority of the full-time scallop vessels in the scallop fishery). The Council voted 15-1 in favor of the emergency request with the NMFS representative voting against, based on NMFS's policy to avoid unanimous votes for emergency

recommendations, which would obligate the Secretary to implement the emergency request. This policy was explained to the Council.

Pursuant to the Council's request, NMFS publishes this emergency action to close the ETA for 180 days, the maximum allowed, without an extension, under Magnuson-Stevens Act. NMFS expects that the closure will continue for an additional 2 years through a combination of an extension of the emergency action, as allowed under the Magnuson-Stevens Act, if needed, measures being developed by the Council under Framework 24, and future actions. NMFS does not expect the closure to adversely impact the scallop fleet, because these vessels have flexibility to fish in other areas to make-up for lost fishing opportunities in the ETA.

NMFS's policy guidelines for the use of emergency rules (62 FR 44421; August 21, 1997) specify the following three criteria that define what an emergency situation is, and justification for final rulemaking: (1) The emergency results from recent, unforeseen events or recently discovered circumstances; (2) the emergency presents serious conservation or management problems in the fishery; and (3) the emergency can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. NMFS's policy guidelines further provide that emergency action is justified for certain situations where emergency action would prevent significant direct economic loss, or to preserve a significant economic opportunity that otherwise might be foregone. NMFS has determined that the issue of closing ETA meets the three criteria for emergency action for the reasons outlined below.

The emergency results from recent, unforeseen events or recently discovered circumstance. The new information from the ETA 2012 scallop surveys presents a recently

discovered circumstance and therefore warrants emergency action. Results of the most recent survey were presented at the August 20 and 21, 2012, Scallop PDT meeting. The new information suggests that there is a significantly larger amount of small scallops in ETA than projected through Framework 22, which changed the ETA from an access area into an open area. In 2012, the mean number of scallops per tow with less than 75 mm shell height in the ETA was 994, compared to 24 in 2011.

This situation presents serious conservation or management problems in the fishery. The success of the entire scallop area rotation program, and the need to attain optimal yield from this fishery, depends on timely openings and closing of access areas in order to protect scallop recruitment and optimize yield. This is particularly true in the Mid-Atlantic, where recruitment has been well below average for several years but has recently begun to rebound. If the smaller scallops are not protected as soon as possible, it would jeopardize the area rotation program and optimal production of scallops in the ETA in the future. Fishing effort in the ETA could compromise the overall success of the area rotation program and achieving optimum yield. Fishing activity in ETA could negatively impact scallop recruitment and reduce long-term biomass and yield from the area. Due to low catch rates of legal-size scallops in this area, there is much concern about discard and bycatch mortality of the abundant smaller scallops that could occur while vessels are targeting the larger scallops. Further, when catch rates fall, vessels must fish longer to harvest the same total catch, increasing area swept, or time that fishing gear is in the water. Increased area swept has greater impacts on bycatch, habitat, and protected resources, as well as increased costs for fishing vessels due to longer trips. The increase in fishing costs would also have negative impacts on the producer surplus and net economic benefits from the fishery.

The emergency can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. The Council has the authority to develop a management action to close the ETA and it is doing so through Framework 24, but this process is too slow to address the immediate problem presented in the ETA. Framework 24 was adopted by the Council in November 2012, but will not be implemented until the spring of 2013 due to procedural and rule making requirements. However, protection of the small scallops in the ETA is needed as soon as possible to prevent vessels from depleting the abundance of small scallops by fishing inefficiently in the ETA. There is no other action that either the Council or NMFS can take through the normal rulemaking process that would enable us to implement the critical closure in time to prevent harmful fishing activity in the ETA. An emergency action enables us to redirect open area scallop fishing effort in order to avoid unnecessary adverse biological and economic impacts. Therefore, the urgency to protect these small scallops through a final rule outweighs the value of providing prior public comment, particularly given that the members of the public most affected by this action have requested it and public comment was provided at the September Council meeting.

#### Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this rule is necessary to respond to an emergency situation and is consistent with the national standards and other provisions of the Magnuson-Stevens Act and other applicable laws. The rule may be extended for a period of not more than 186 days as provided under section 305(c)(3)(B) of the Magnuson-Stevens Act.

The Assistant Administrator for Fisheries, NOAA, finds good cause under 5 U.S.C. 553(b)(B) that it is contrary to the public interest and impracticable to provide for prior notice and opportunity for the public to comment. As more fully explained above, the reasons justifying promulgation of this rule on an emergency basis make solicitation of public comment contrary to the public interest.

By closing the ETA, this action avoids jeopardizing the success of the access area program in future years by protecting scallop recruitment in the ETA. The new information from the ETA 2012 scallop surveys suggests that there is a significantly larger amount of small scallops in ETA than projected through Framework 22, which changed the ETA from an access area into an open area. An analysis of VMS data showed that, in the 2 months following this PDT meeting, 36 trips were taken in the ETA, resulting in over 3,000 hr of fishing activity. There is no action that either the Council or NMFS can take through the normal rulemaking process that would enable NMFS to implement the critical closure in time to prevent harmful fishing activity in the ETA. This emergency action enables NMFS to redirect open area scallop fishing effort in order to avoid unnecessary adverse biological and economic impacts. Therefore, the urgency to protect these small scallops through a final rule outweighs the value of providing prior public comment, particularly given that the members of the public most affected by this action have requested it and public comment was provided at the September Council meeting. This action did not allow for prior public comment because the review process and determination could not have been completed any earlier, due to the inherent time constraints associated with the process. The new information from the ETA 2012 scallop surveys presents a recently discovered circumstance and therefore warrants emergency action. Results of the most recent survey were only presented at the August 20 and 21, 2012, Scallop PDT meeting. Although this



action is being implementing without notice and comment, NMFS is seeking public comment on this rule for purposes of assessing the need to extend the rule if other measures to close the area are not implemented before the expiration of this rule.

For these same reasons stated above, pursuant to 5 U.S.C. 553(d)(3), the Assistant Administrator finds good cause to waive the full 30-day delay in effectiveness for this rule. This action is undertaken at the request of the Council. The Council, with the support of a group representing a large portion of the industry, urged that NMFS implement this action quickly in order to minimize any fishing effort in the ETA. Moreover, it would be contrary to the public interest if this rule does not become effective immediately because even an additional 30 days of fishing in the area could lead to increased mortality of small scallops in the ETA. This could have negative impacts on recruitment in the short and medium term, and could reduce the long term biomass and yield from the ETA and the overall Mid-Atlantic. For these reasons, there is good cause to waive the requirement for delayed effectiveness.

Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

In the interest of receiving public input on this action, the EA analyzing this action will be made available to the public and this temporary final rule solicits public comment.

This rule has been determined to be not significant for purposes of Executive Order 12866.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: December 6, 2012

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Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

performing the functions and duties of the

Assistant Administrator for Fisheries,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648--FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

§ 648.53 [Amended]

2. In § 648.53, paragraph (b)(4)(v) is suspended.

3. In § 648.58, paragraph (e) is added to read as follows:

§ 648.58 Rotational Closed Areas.

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(e) Elephant Trunk Closed Area. No vessel may fish for scallops in, or possess or land scallops from, the area known as the Elephant Trunk Closed Area. No vessel may possess scallops in the Elephant Trunk Closed Area, unless such vessel is only transiting the area as

provided in paragraph (c) of this section. The Elephant Trunk Closed Area is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request):

<b>Point</b>	<b>Latitude</b>	<b>Longitude</b>
ETA1	38°50' N.	74°20' W.
ETA2	38°10' N.	74°20' W.
ETA3	38°10' N.	73°30' W.
ETA4	38°50' N.	73°30' W.
ETA1	38°50' N.	74°20' W.

[FR Doc. 2012-29967 Filed 12/11/2012 at 8:45 am; Publication Date: 12/12/2012]